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TRUSTS AND SUCCESSION*

JOEL N. MINSKER**

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I. INTRODUCTION

This survey covers only the property law aspects of trusts and succession. The reader is cautioned at the outset that there is a vast body of tax law in this area which usually does not appear in state court cases, but does appear on the federal level. The practitioner of today must consider tax law in conjunction with the property law before taking any action. However, the tax aspects are too vast to be included here.

II. LEGISLATION

Between the Special Session of the legislature in December 1969 and the Second Special Session in June 1971, the Florida Legislature

* The decisions surveyed in this article appear in volumes 224 through 252 of the Southern Reporter, Second Series. All Florida legislation from the special session in December 1969 through the second special session in June 1971 is included, as are the 1971 amendments to the Florida Rules of Civil Procedure.

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enacted a massive amount of legislation dealing with trusts and succession. However, only major legislative changes or additions will be covered in detail. Changes relating to the salaries of various county judges,¹ changes in chapter 253 of the Florida Statutes regarding the Internal Improvement Trust Fund,² and various other changes³ will not be covered as they add nothing to the substantive law covered by this survey and are only mechanical in nature and application.

Florida Laws 1970, chapter 70-295 makes a significant addition to the Savings Association Act⁴ authorizing building and loan associations and savings and loan associations to maintain and lease safe deposit facilities.⁵ Formerly, these facilities were available only at commercial banks.⁶ While the new act seems to track the existing rights and responsibilities of lessors and lessees,⁷ the institutions are different, and, therefore, the appropriate sections should be checked carefully by the practitioner.

The disposition of proceeds of life insurance has been substantially affected by Florida Laws 1970, chapter 70-376, which effected a major rewording of section 222.13 of the Florida Statutes (1969). Previously, under section 222.13, the death of the named beneficiary before the insured's death resulted in the policy being payable to the insured's estate, unless the policy provided otherwise. Under Florida Laws 1970 chapter 70-376, no such provision was included. Now, a determination must be made as to whether the beneficiary had a vested or contingent interest in the proceeds. In addition, the effect of the Uniform Simultaneous Death Law⁸ will have to be considered. Generally though, the new law provides that life insurance proceeds will go to the designated beneficiary exclusively and will be exempt from the claims of creditors, unless the policy or a valid assignment declares otherwise.⁹ However, when the insurance proceeds by designation or otherwise are payable to the estate of the insured, they are estate assets for purposes of probate as well as taxes.¹⁰

1. FLA. STAT. §§ 44.09, 44.12 (Supp. 1970); Fla. Laws 1971, ch. 71-48, *amending* FLA. STAT. ch. 44 (1969) (dealing with county judges, salaries and budgets).

2. FLA. STAT. §§ 253.02, 253.05, 253.12, 253.122-.124, 253.1281, 253.151, 253.62 (Supp. 1970); Fla. Laws 1971, ch. 71-286.

3. FLA. STAT. 40.38 (Supp. 1970) (dealing with the drawing of jurors); FLA. STAT. § 28.231 (Supp. 1970) (massive restructuring of fees and commissions); Fla. Laws 1971, ch. 71-114 (setting up special contingency trust fund for state for excessive fees collected prior to effective date revising fees).

4. FLA. STAT. ch. 665 (1969). Fla. Laws 1970, ch. 70-295, *added* FLA. STAT. §§ 665.55-.64 (Supp. 1970). The reader should note that the codification numbers of the added statutes in the 1970 Florida Session Laws do not correspond with the numeration which appears in the 1970 Supplement to Florida Statutes, 1969 (Unofficial). The latter numeration is used herein.

5. FLA. STAT. §§ 665.55-.64 (Supp. 1970). Note that these are the corrected statutory section numbers. *See* note 4 *supra*.

6. FLA. STAT. §§ 659.43-.51 (1969).

7. *Compare* note 5 *supra* with note 6 *supra*.

8. FLA. STAT. § 736.05 (1969). *See also* 18A FLA. JUR. *Insurance* §§ 897-900 (1971).

9. Fla. Laws 1970, ch. 70-376, *amending* FLA. STAT. § 222.13(1) (1969).

10. *Id.*

A new chapter 409 of the 1970 Supplement to the Florida Statutes, 1969, has been created by Florida Laws 1970, chapter 70-255, setting up the Department of Health and Rehabilitative Services to replace the State Department and State Board of Social Services. Florida Statutes section 409.315 (Supp. 1970) deals with the payments of accrued public assistance benefits to the deceased's beneficiaries, and section 409.345 of the Florida Statutes (Supp. 1970) deals with the priority and right of the state to make a claim against the decedent's estate.¹¹

Florida Laws 1970, chapter 70-54, section 1, reenacted section 736.17 of the Florida Statutes (1967) regarding bequests and devises to a trustee. This reenactment was necessary because Florida Laws 1969, chapter 69-88, which enacted the Uniform Anatomical Gift Act may have been interpreted to repeal that section. Florida Laws 1970, chapter 70-54, makes it clear that this was *not* the legislative intent and further states:

Insofar as Chapter 69-88 may appear to repeal Section 736.17, Florida Statutes 1967, it is acknowledged that Chapter 69-88 did not conform to the requirements of Section 6, Article III, of the constitution of the State of Florida and is void.¹²

In addition, if any repeal is later found, then this reenactment is retroactive to the effective date of Florida Laws 1969, chapter 69-88.¹³

In 1971, section 736.17 of the Florida Statutes (1969) received an additional subsection providing that bequests and devises to a trustee shall *not* be invalid because of any of the provisions of section 689.075 of the Florida Statutes (1969).¹⁴

Florida Laws 1970, chapter 70-4, dramatically revised the rights of married women with respect to their property.¹⁵ They may now separately relinquish or alter their dower rights.¹⁶

The powers of trustees were enlarged under Florida Laws 1970, chapter 70-425, which amended section 691.03(7) of the Florida Statutes (1969). Now a trustee has the power to exchange capital stock of any bank or holding company for capital stock in any registered bank holding company subject to the provisions of the Bank Holding Company Act of 1956.¹⁷

11. FLA. STAT. § 409.315, 409.345 (Supp. 1970). Fla. Laws 1970, ch. 70-255, incorrectly numbered these sections 409.316 and 409.346 respectively.

12. Fla. Laws 1970, ch. 70-54, § 3.

13. Fla. Laws 1970, ch. 70-54, § 2.

14. Fla. Laws 1971, ch. 71-34, adding FLA. STAT. § 736.17(2)(e). FLA. STAT. § 689.075 (1969) deals with the validity of an inter vivos trust. Despite the retention of certain enumerated powers in the trustee, the statute makes it clear that it is not a testamentary disposition.

15. Amending FLA. STAT. §§ 694.04, 708.08-.09 (1969); repealing FLA. STAT. §§ 62.021, 693.01-.05, 693.13-.14, 708.01-.04, 708.06-.07 (1969). This was necessary as a result of FLA. CONST. art. X, § 5 (1968) which abolished the distinction between the property rights of married men and women.

16. FLA. STAT. § 708.08, 708.09 (Supp. 1970).

17. 12 U.S.C. §§ 1841-49 (1970).

The responsibilities of banks and trust companies under the Banking Code for reporting,¹⁸ assessments,¹⁹ and allowable investments²⁰ have been changed significantly and should be carefully consulted by the practitioner.

Florida charities were immensely benefited when the Charitable Trust Act of 1971 was enacted.²¹ The act affects existing and future private foundation trusts and split interest trusts²² and provides that a trustee may elect to come under the act if eligible.²³ Furthermore, it expresses "the intent of the state of Florida to preserve, foster and encourage gifts to or for the benefit of charitable organizations."²⁴ The act will bestow many tax benefits on the trust along with responsibilities and duties upon the trustee. The practitioner is urged to consult the act in detail for all far-reaching ramifications and cross-references to the Internal Revenue Code. The effective date of the act is November 1, 1971.²⁵

Death benefits of any kind, not just limited to those from insurance policies or employee's trusts, may be made payable during life or by will to a trustee for a revocable or an irrevocable trust. Furthermore, "[i]t shall *not* be necessary to the validity of any such trust agreement, or declaration of trust, whether revocable or irrevocable, that it have a *trust corpus* other than the right of the trustee to receive such death benefits."²⁶ The insurer will pay the proceeds to the executor or administrator if no trustee claims within one year.²⁷ If the proceeds are paid to a trustee, they "shall not be deemed to be part of the estate of the testator or intestate estate."²⁸

A custodian under the Florida Gifts to Minors Act can now resign or appoint a successor custodian, *without the necessity of a court proceeding*. All that is now required is a written instrument executed before a subscribing witness other than the custodian.²⁹ In addition, if the custodian dies without naming a successor, and the minor is over fourteen-years-old and has no guardian, then the minor himself may designate a successor custodian by means of a written instrument executed before a subscribing witness other than the successor.

18. Fla. Laws 1970, ch. 70-407, adding FLA. STAT. § 658.07(1) (Supp. 1970).

19. Fla. Laws 1970, ch. 70-263, amending FLA. STAT. § 658.08 (1969).

20. Fla. Laws 1971, ch. 71-167, amending FLA. STAT. § 659.20(5)(c) (Supp. 1970) (increasing allowable investments in incorporated companies from two to five percent of the unimpaired capital and surplus). See generally Fla. Laws 1970, ch. 70-411, amending FLA. STAT. § 659.20 (Supp. 1970).

21. Fla. Laws 1971, ch. 71-256.

22. Fla. Laws 1971, ch. 71-256, § 2.

23. *Id.* § 10.

24. *Id.* § 12.

25. *Id.* § 15.

26. Fla. Laws 1971, ch. 71-248, § (1) (emphasis added).

27. *Id.* § 1(3).

28. *Id.* § 1(4).

29. Fla. Laws 1971, ch. 71-23, amending FLA. STAT. § 710.08 (1969).

Section 736.25(2) of the Florida Statutes (1969), dealing with the manner of executing anatomical gifts under the Uniform Anatomical Gift Act,³⁰ has been amended by Florida Laws 1971, chapter 71-201. It now requires that the document making the gift be signed by the donor and two witnesses all of whom must sign in the presence of each other. Previously, this was required only if the donor could not sign himself. Additionally, the form for the Uniform Donor Card was added by the new section.³¹

Various changes in the procedures for the taxation of a decedent's estate were made by Florida Laws 1971, chapter 71-202. The sections of the Florida Statutes that have been amended and the resulting changes are as follows: (1) section 198.02 of the Florida Statutes (1969) now provides that the Florida estate tax on resident decedents' estates shall not be less than the pro rata credit amount under the federal revenue act; (2) sections 198.13 and 198.15 of the Florida Statutes (1969) have been amended to change the fifteen month filing and tax due period to nine months; (3) section 198.32 of the Florida Statutes (1969) has been changed to increase the certificate of nonliability fee from one to five dollars; and (4) section 198.12 of the Florida Statutes (1969) no longer requires filing of a copy of the federal preliminary notice to comply with the state notice requirements within two months of the decedent's death.

Section 689.075 of the Florida Statutes (1969) deals with the validity of otherwise valid inter vivos trusts where certain powers are retained by the settlor. Florida Laws 1971, chapter 71-126, has attempted to clarify the execution aspects and the effect of this section on Totten type bank accounts. Section 689.075(1)(g) of the Florida Statutes (1969) has been amended to provide that an inter vivos trust will not be regarded as an attempted testamentary disposition, nor will it be invalidated when the settlor is sole trustee if "at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction."³² Additionally, section 689.075(2) of the Florida Statutes (1969) was amended to make it clear that nothing contained in the statute would effect the validity of bank accounts where one person holds them in trust for another and where the arrangement is revocable by the settlor, that is, Totten type arrangements.³³

Under Florida Laws 1971, chapter 71-205, a new provision, section 659.291 of the Florida Statutes relating to the Banking Code, has been added. This section creates a presumption that the deposits vest in the survivors where there are bank deposits in two or more names, and one of the parties dies. This presumption "may be overcome only by proof of

30. FLA. STAT. §§ 736.20, 736.22, 736.24-.28, 736.30 (1969).

31. FLA. LAWS 1971, ch. 71-201, *amending* FLA. STAT. § 736.25(2) (1969).

32. FLA. LAWS 1971, ch. 71-126, § 1.

33. *Id.* § 2.

fraud, undue influence, or clear and convincing proof of a contrary intent."³⁴

Section 660.10(3) of the Florida Statutes (1969) relating to the trust powers and duties of out-of-state corporations was amended to allow the receipt of devises of *real* property located in Florida rather than only bequests of money or intangible personal property. In addition, an out-of-state corporation, which is authorized to act as trustee under the laws of the place where it has its principal place of business, can sell, transfer, and convey real property.³⁵

Florida Laws 1971, chapter 71-24, has changed the definition of a small estate under section 735.01 of the Florida Statutes (1969) to be one having a gross value of less than \$10,000 exclusive of exempt property rather than the previous \$3,000 limit. Additionally, section 735.04 (2) of the Florida Statutes (1969) has been amended to allow a county judge to dispense with the administration of testate or intestate estates having an aggregate value of less than \$10,000 exclusive of exempt property rather than the previous \$5,000 limit.

The rights and procedures for disclaiming property in Florida have been spelled out in two new sections to the Florida Statutes. Section 689.21 of the Florida Statutes, added by Florida Laws 1971, chapter 71-31, deals with nontestamentary disclaimers, and section 731.37 of the Florida Statutes, added by Florida Laws 1971, chapter 71-33, deals with disclaimers from decedents' estates. These two acts are too extensive to be covered in this survey, but must be consulted by the practitioner due to their obvious impact on the property law aspects of trusts and estates in addition to their tax implications. Interestingly enough, both acts require that disclaimer be made within twelve months after the creation or ascertainment of the interest. The right to disclaim is barred if the disclaimant is insolvent at the time of the event which gave rise to the right to disclaim, or if the property was judicially sold prior to the filing of disclaimer. The right to disclaim exists regardless of any implied spendthrift provision or similar restriction. Finally, if a wife consents to the disclaimer, she is automatically barred from dower.

The non-claim statute³⁶ received an additional exemption under Florida Laws 1971, chapter 71-32, with the addition of section 733.16 (1)(e) of the Florida Statutes. This additional exemption gives to any person who has paid the debt or funeral expenses of the decedent the rights the payee would have had to claim under this statute against the estate. Furthermore, if this third person happens to be the personal representative and files a written statement, he also can assert a claim against the estate as of the date of filing. In the event he so files, his interest will

34. Fla. Laws 1971, ch. 71-205, *adding* FLA. STAT. § 659.291(2).

35. Fla. Laws 1971, ch. 71-55.

36. FLA. STAT. § 733.16(1) (1969), known as the non-claim statute, generally requires the filing of all claims against the estate within six months after the first publication of notice to creditors.

not be deemed adverse³⁷ unless an objection to the payment has been duly filed.

Florida Laws 1971, chapter 71-25, has placed another requirement on a widow's right to claim dower in real property conveyed by her husband prior to his death. Due to the addition of section 731.35(4) of the Florida Statutes, a widow is now required to file an instrument with the clerk of the circuit court for the county in which any real property is located, sufficient to give constructive notice that she has elected or may elect to take dower within three years of her husband's death. It is important to note that this subsection does not extend the time to elect dower,³⁸ nor does it affect any other requirements relating to electing or assigning dower.

Dower has also been severely affected when a partnership, whether general or limited, acquires real property in the partnership name. Now, under Florida Laws 1971, chapter 71-71, as to general partnerships and Florida Laws 1971, chapter 71-9, as to limited partnerships, "[i]nchoate dower shall not exist in any interest in partnership real property and spouses of either limited or general partners who execute conveyances, encumbrances or other instruments affecting title to its real property need not join in the conveyance, encumbrance or instrument."³⁹

Florida Laws 1971, chapter 71-147, removed the disability of nonage for both male and female minors who are married, divorced, widowed, etc., and leaves minors free to manage their own estate.

Service of a writ of garnishment on one specified in the writ as being in a fiduciary or representative capacity shall make him liable just as any other garnishee under Florida Laws 1971, chapter 71-69, which adds section 77.06(4) of the Florida Statutes.

Florida Laws 1971, chapter 71-20, provided for the special election held on November 2, 1971, which amended section 5 of article VII of the Florida Constitution (1968) "limiting the prohibition against *estate, inheritance* and income taxes to natural persons only."⁴⁰

The state Department of Insurance may now require at its discretion and for good cause that both domestic and foreign insurers deposit in trust eligible securities,⁴¹ in an amount not less than \$75,000 nor more than \$250,000, in addition to other deposits required under the Insurance Code as a result of Florida Laws 1971, chapter 71-89, amending section 624.0210(3) of the Florida Statutes (1969).⁴²

37. FLA. STAT. § 732.55 (1969) requires the appointment of an administrator ad litem when the personal representative has an adverse claim to the estate.

38. FLA. STAT. § 731.35(1) (1969) generally requires this election to be made within nine months after the first publication of notice to creditors.

39. Fla. Laws 1971, ch. 71-9, § 2, *adding* FLA. STAT. 620.081(3) (for limited partnerships). *See also* Fla. Laws 1971, ch. 71-71, § 3 (for general partnerships).

40. (Emphasis added). This legislation was overwhelmingly passed by the voters, thus paving the way for a corporate income tax.

41. FLA. STAT. § 625.0202 (1969) defines eligible securities.

42. FLA. STAT. § 624.0210(3) (1969) only covered companies writing property, casualty,

Florida Laws 1971, chapter 71-29, repealed numerous specified general laws of local application to strengthen home rule government of municipalities. However, it specifically exempted any trust agreements in effect under the enumerated repealed laws.⁴³

Florida Laws 1971, chapter 71-127, amending section 617.50(10) of the Florida Statutes (1969), now allows trust banks for scholarship plans to be *any* state or federally approved bank whose deposits are insured by an agency similar to the Federal Deposit Insurance Corporation. Previously, these banks could be located only in Florida.⁴⁴

III. TRUSTS

A. *Express Inter Vivos and Testamentary Trusts*

In the case of *In re Estate of Herron*,⁴⁵ the District Court of Appeal, Fourth District, upheld the creation of an inter vivos trust which at the time of its creation contained only a life insurance policy.⁴⁶ The policy was delivered and payable to the trustee, and the benefits were to be paid to the wife of the settlor in lieu of dower. In addition, the settlor created a pour-over will into the inter vivos trust. The Fourth District, in upholding the inter vivos trust, also held that the proceeds of the life insurance policies were not subject to dower since the trust instrument indicated a clear intent to create an inter vivos trust, and since the trust had substantial existence during the testator's life and was not testamentary. Interestingly enough, the settlor had retained all privileges under the policies, including the power to revoke or amend, and had relinquished only the right to change the method of payment to the trustee. The trustee's sole duty during the settlor's lifetime was to maintain custody of the instrument and to wait for the settlor's death. After the settlor's death, the widow unsuccessfully attacked the trust as being illusory because of the broad powers retained by the settlor. Judge Reed rejected this argument based on *Hanson v. Denckla*,⁴⁷ and in some far-reaching dicta stated:

Furthermore, we do not believe the Hanson case is controlling today. The public policy of this state as expressed by Ch. 69-192, Laws of Florida, 1969, [Florida Statute section 689.075] is not to invalidate an otherwise proper inter vivos trust merely because the settlor of the trust has retained substantial powers over the trust res as well as the trustee. This statute does not apply to the present trust, but in our opinion it is declaratory

surety, or title insurance. Now, *all* insurance companies come under this statute as a result of the change.

43. Fla. Laws 1971, ch. 71-29, § 4.

44. FLA. STAT. § 617.50(10) (1969).

45. 237 So.2d 563 (Fla. 4th Dist. 1970).

46. See note 26 *supra* and the related textual discussion.

47. 100 So.2d 378 (Fla. 1956) (trust held illusory due to day-to-day control retained by settlor).

of the law existent at the time the trust instrument was executed.⁴⁸

The fact that the major benefits in a life insurance policy occur at death was not enough to make the trust testamentary.⁴⁹

The District Court of Appeal, Third District, held that under section 731.21 of the Florida Statutes (1969)⁵⁰ the named beneficiaries of an express testamentary trust were entitled to payments upon the death of the testator and did not have to wait until the bank qualified as trustee two years later to receive payments.⁵¹ The funding of the trust was held not always to be essential to the accrual of the right to payments under a trust, where the corpus of the trust could be used for payments to beneficiaries even though the primary purpose of the trust was to provide income for the remaining lives of the beneficiaries.⁵²

In a per curiam affirmance, the District Court of Appeal, Fourth District, in the case of *In re Estate of Strohm*,⁵³ upheld a lower court order which directed payment of all federal estate taxes including those attaching to the assets of an inter vivos trust out of the residuary estate of the will, even though the trust had been amended *prior* to the execution of the will to provide for such tax payments out of the principal of the trust. The results of this case revolve around the application of section 734.041(1)(c) of the Florida Statutes (1969). The dissenting opinion of Judge McCain, in which the argument that the later will superseded the trust amendment provision was attacked, is well worth reading.⁵⁴

B. Totten Trusts

In *Litsey v. First Federal Savings & Loan Association*,⁵⁵ the District Court of Appeal, Second District, reaffirmed the adoption in Florida of the Totten Trust doctrine⁵⁶ as originally adopted in *Seymour v.*

48. *In re Estate of Herron*, 237 So.2d 563, 566 (Fla. 4th Dist. 1970). See also notes 32 and 33 *supra* and the related textual discussion for the latest legislative changes to FLA. STAT. § 689.075 (1969); note 14 *supra* for a discussion of this statute; and note 60 *infra* for almost identical language to the quoted material regarding Totten Trusts.

49. *In re Estate of Herron*, 237 So.2d 563, 567 (Fla. 4th Dist. 1970).

50. The death of the testator is the event which vests the right to legacies or devises unless the testator in his will has provided that some other event must happen before a legacy or devise shall vest.

FLA. STAT. § 731.21 (1969).

51. *In re Trust of Bowen*, 240 So.2d 318 (Fla. 3d Dist. 1970).

52. *Id.* at 320.

53. 241 So.2d 167 (Fla. 4th Dist. 1970).

54. FLA. STAT. § 734.041(1)(c) (1969) provides for the apportionment of estate taxes and payment by the inter vivos trust and not apportionment among the temporary and remainder estates unless otherwise directed in the trust instrument.

55. 243 So.2d 239 (Fla. 2d Dist. 1971) [hereinafter cited as *Litsey*].

56. A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies

Seymour.⁵⁷ In *Litsey*, the executor attempted to overturn thirteen Totten Trust bank accounts which distributed proceeds (approximately \$160,000) to distant relatives rather than to the testator's children. The executor argued that the Totten Trust doctrine should be overruled or receded from as it was contrary to the Statute of Wills,⁵⁸ the Florida policy of using joint accounts for testamentary purposes, and the policy against illusory or naked trusts as expressed in *Hanson v. Denckla*.⁵⁹ Chief Judge Pierce of the District Court of Appeal, Second District, completely rejected the executor's argument and based his decision on section 689.075 of the Florida Statutes (1969).⁶⁰

C. Purchase Money Resulting Trusts

In a divorce action, if the wife can prove she was the sole contributor to the purchase of property held by both spouses as tenants by the entirety, the husband will be deemed to hold that property as trustee in a resulting trust in favor of the wife.⁶¹ There is no presumption of a gift from the wife to the husband; "on the contrary, the presumption arises that the husband is the trustee of a resulting trust with the wife as beneficiary thereof or that a special equity exists in her favor"⁶²

The mere fact that a father put up the purchase money for certain real estate purchased in his daughter's name and that at a subsequent sale there was an alleged oral agreement to divide the proceeds between father and daughter, was held to be insufficient evidence to justify the imposition of a resulting trust in favor of the father.⁶³

D. Constructive Trusts

In *Mudarri v. Gillespie*,⁶⁴ the Supreme Court of Florida ordered the imposition of a constructive trust upon the heirs of an estate under the authority of section 735.11(1) of the Florida Statutes (1969). This statute allows a creditor or claimant to have a constructive trust im-

before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.

Matter of Totten, 179 N.Y. 112, 125-126, 71 N.E. 748, 752 (1904).

57. 85 So.2d 726 (Fla. 1956).

58. FLA. STAT. § 731.07 (1969).

59. 100 So.2d 378 (Fla. 1956). See note 47 *supra*.

60. While not applicable to the present trusts, F.S. § 689.075(2) F.S.A. specifically excludes trust accounts, such as the ones involved here, from having to be in conformity with the formalities for the execution of wills. Thus the Totten Trust doctrine is a firmly established rule of law in Florida.

Litsey v. First Fed. Sav. & Loan Ass'n, 243 So.2d 239, 241 (Fla. 2d Dist. 1971) (emphasis added). This language is similar to that used by Judge Reed in *In Re Estate of Herron*, 237 So.2d 563, 567 (Fla. 4th Dist. 1970). See notes 48-49 *supra* and accompanying text.

61. *Hegel v. Hegel*, 248 So.2d 212 (Fla. 3d Dist. 1971).

62. *Id.* at 214.

63. *Goldberg v. Michalik*, 237 So.2d 298, 300 (Fla. 2d Dist. 1970).

64. 226 So.2d 808 (Fla. 1969), *conformed to* in 228 So.2d 297 (Fla. 3d Dist. 1969) [hereinafter cited as *Mudarri*].

pressed upon any estate within three years of the death of the decedent or six months from first publication of an order of administration unnecessary. In *Mudarri*, the plaintiffs had been injured in an automobile accident with the decedent two years prior to his death. In order to receive an order for administration unnecessary under section 735.04(2) of the Florida Statutes (1967),⁶⁵ the heirs did not inform the judge of the existence of a \$20,000 automobile insurance policy. Since an automobile liability insurance policy is an asset of the estate,⁶⁶ the Supreme Court of Florida felt that these circumstances required the equitable remedy afforded under section 735.11(1) of the Florida Statutes (1967) since "[a] constructive trust is a remedial device designed to prevent fraud or unjust enrichment."⁶⁷

Constructive service of process is all that is necessary when one is trying to impose a constructive trust on the proceeds of an estate.⁶⁸

E. Powers and Duties of the Trustee

"The duties, powers and liabilities of executors and trustees are ordinarily fixed by the terms of the will and the trust agreement."⁶⁹

*Barker v. The Board of Education of the Florida Annual Conference of the Methodist Church*⁷⁰ illustrates how broad a trustee's power can be. In *Barker*, the trustees' action in closing down Georgia Seagle Hall in Gainesville, Florida, was upheld against an attack by the alleged trust beneficiaries as the best economic alternative until a study was undertaken to determine the best interests of the charitable testamentary trust. Though the court upheld the trustees action and refused to issue a temporary injunction, it did indicate that the beneficiaries did possess a sufficient interest to maintain the suit and that there had been no adjudication as to any construction of the trust document.⁷¹

Rule 1.210(c) of the Florida Rules of Civil Procedure allows trustees to represent beneficiaries in actions in which title to the property

65. As discussed previously under the legislation section of this survey, newly-enacted FLA. STAT. § 735.04(2) [added by Fla. Laws 1971, ch. 71-24] allows a county judge to dispense with the administration of an estate having an aggregate value of less than \$10,000 exclusive of exempt property. This figure was changed from its previous limit of \$5,000.

66. *In re Estate of Klipple*, 101 So.2d 924 (Fla. 3d Dist. 1958).

67. *Mudarri v. Gillespie*, 226 So.2d 808, 813 (Fla. 1969).

68. *Freedman v. Freedman*, 226 So.2d 455 (Fla. 3d Dist. 1969).

69. *Jones v. First Nat'l Bank*, 226 So.2d 834, 835 (Fla. 4th Dist. 1969), wherein the court dismissed a suit brought against executors and trustees for failure of the plaintiffs to attach copies of agreements to the appellate record and, thus, failed to establish an adequate record.

70. 245 So.2d 668 (Fla. 1st Dist. 1971) [hereinafter cited as *Barker*].

71. *Id.* at 669 (dictum). It should be noted that the court was upholding the denial of a temporary restraining order. "[P]laintiffs have failed to demonstrate such an interest as would entitle them to injunctive interference for the present and that the action on the part of the trustees does not presently warrant injunctive interference . . ." *Id.* However, in light of the court's indication that the plaintiffs did have a sufficient interest to maintain the suit, this court could well take a different view of a suit for a permanent injunction or another allied claim.

is vested in the trustees. However, where the trustee asks the beneficiary to provide counsel to defend the trustee and instead the beneficiary defends himself individually, the courts will allow the beneficiary to appear and defend if the trustee fails to do so.⁷² This was the case in *Cowen v. Knott*,⁷³ where the bank, as trustee of a land trust, asked the beneficiaries to bring in counsel to defend them in a mortgage foreclosure action, and the beneficiaries filed defensive answers individually.

Section 689.071 of the Florida Statutes (1969) validates the Land Trust doctrine in Florida and allows a trustee to hold bare legal title for the beneficial owner. In *Ferraro v. Parker*,⁷⁴ the District Court of Appeal, Second District, upheld the interest of the beneficiary as personalty and not realty under the authority of section 689.071(4) of the Florida Statutes (1969)⁷⁵ since the trust agreement in question so provided. Thus, the beneficiary's pledge of that interest was not held to be a mortgage on realty. In dicta, Judge Pierce stated in *Ferraro* that the land trust is clearly an active rather than a mere passive trust.⁷⁶

The Second District again dealt with a land trust in *Cowen v. Knott*.⁷⁷ In *Cowen*, the court held that the beneficiaries may become active when the trustee in a land trust refuses to do so.

Lest it be thought that a land trust is the only type of a trust where the trustee's power can be severely limited without invalidating the trust, the case of *In re Estate of Herron*⁷⁸ should be considered. In that case, the subject of the trust was a life insurance policy, and even though the trustee's sole duty was to maintain custody of the policy during the settlor's lifetime, the court did not consider the trust to be an illusory one since there was a clear intent to establish a trust on the part of the settlor. In addition, the court saw an implied duty of the trustee to hold himself in readiness for the performance of more active duties after the settlor's death.

F. Charitable Testamentary Trusts

The District Court of Appeal, Second District, applied a limitation on the use of the *cy pres* doctrine⁷⁹ in *Jewish Guild for the Blind v.*

72. *Cowen v. Knott*, 252 So.2d 400 (Fla. 2d Dist. 1971).

73. *Id.*

74. 229 So.2d 621 (Fla. 2d Dist. 1969) [hereinafter cited as *Ferraro*].

75. In all cases where said recorded instrument, as hereinabove provided, contains a provision defining and declaring the interests of beneficiaries thereunder to be personal property only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this state.

FLA. STAT. § 689.071(4) (1969).

76. Judge Pierce cited as his authority, McKillop, *The Illinois Land Trust in Florida*, 13 U. FLA. L. REV. 173 (1960). *Ferraro v. Parker*, 229 So.2d 621, 624 (Fla. Dist. 1969). This author knows of no case in Florida to date which actually holds the duties of the trustee in a land trust to be active.

77. 252 So.2d 400 (Fla. 2d Dist. 1971) [hereinafter cited as *Cowen*]. See note 72 *supra* and the related textual discussion.

78. 237 So.2d 563 (Fla. 4th Dist. 1970). See note 45 *supra* and the related textual discussion.

79. In charitable trusts, if it is impossible, illegal, or impractical to carry out the specific terms of the trust as stated by the settlor, and he has stated a general charitable purpose, the

First National Bank.⁸⁰ In that case, the testator had left a testamentary trust which left funds for the construction of a new building for a certain charitable organization, but had not left sufficient funds for a complete building. Under the terms of the trust, it was also provided that the funds were to be given to a second charity if not used for the original stated purpose. Since the funds were insufficient to build a separate building, the first charitable organization wanted to simply add an additional floor to its existing building, and the second charitable organization agreed to go along with the desires of the first. Despite this agreement, Judge McNulty, speaking for the majority, stated:

We only hold that when the dominant intention of the settlor of a trust can be substantially complied with by the alternatives expressly set forth in the trust, the *cy pres* doctrine is not necessary to aid in the execution of the trust and is therefore inapplicable.⁸¹

Even though the trustees of a charitable testamentary trust have wide discretion, the alleged trust beneficiaries do have standing to bring suit to question the action of the trustees.⁸²

IV. SUCCESSION

A. *Formal Requisites*

1. ATTESTATION AND SIGNING

In *In re Estate of Watson*,⁸³ a will was signed by the decedent in a gasoline station and witnessed by the station operator and another customer. Each witness signed in the other's and the decedent's presence. The attestation and signing was testified to by the station operator alone. This was held to be sufficient evidence to satisfy section 731.07⁸⁴ and section 732.31⁸⁵ of the Florida Statutes (1969) and to admit the will to probate.

Under Section 732.31 of the Florida Statutes (1969),⁸⁶ the burden of proof as to execution and attestation is placed on the proponent of the will in the first instance. However, it can be waived by the conduct

court will authorize the substitution of another reasonably approximate scheme to carry out the testator's general purpose. See A. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 130 (2d ed. 1966).

80. 226 So.2d 414 (Fla. 2d Dist. 1969).

81. *Id.* at 416.

82. *Barker v. The Board of Education of the Florida Annual Conference of the Methodist Church*, 245 So.2d 668 (Fla. 1st Dist. 1971). See note 70 *supra* and the related textual discussion.

83. 226 So.2d 249 (Fla. 1st Dist. 1969).

84. "The testator, in the presence of at least two attesting witnesses present at the same time, must sign his will . . ." FLA. STAT. § 731.07(2) (1969).

85. In all proceedings . . . the burden of proof, in the first instance, shall be upon the proponent thereof to establish, prima facie, the formal execution and attestation thereof

FLA. STAT. § 732.31 (1969).

86. See note 85 *supra*.

and statements of the contestant in not placing the formal execution and attestation of the will in issue at all.⁸⁷

The District Court of Appeal, Third District, stated in *Talmudical Academy v. Harris*,⁸⁸ that although a written promise to make a bequest was executed in Maryland, and though the decedent died in Florida without completing the bequest, the court must still apply section 731.051 of the Florida Statutes (1969) which requires the person to be charged to sign in the presence of two subscribing witnesses. Since this was not done, the petition was denied. The *ratio decidendi* of the case was that the statute is procedural in nature, is part of the probate laws, deals with enforceability rather than validity, and thus is part of the public policy of the state and not subject to the normal rule that the validity of a contract is determined under the law of the place where it is made.⁸⁹

2. COMPETENCY

Normally there is a presumption of a lack of testamentary capacity if a will is executed during an insane delusion or executed by a person adjudged incompetent. However, in three cases dealing with competency of the testator, the Florida courts upheld wills executed with these alleged defects in issue. This would seem to indicate a great desire to leave the final decision to the discretion of the trier of fact.

First, in *In re Estate of Supplee*,⁹⁰ a 79-year-old testatrix, adjudicated incompetent due to a chronic brain syndrome, changed her will because she believed the petitioner stole certain articles from her home. The District Court of Appeal, Second District, upheld the changed will against the petitioner's claim that the testatrix was suffering from an insane delusion because the presumption of lack of testamentary capacity by an adjudged incompetent had been overcome by proof showing the will was executed during a lucid interval. "As this court understands the law relative to insane delusions, it is not the truth or falsity of the 'belief' but, instead, whether or not such belief arose from reasoning from a known premise."⁹¹

In the second case, the District Court of Appeal, Fourth District, upheld a will in favor of non-blood relatives which had been executed by a testatrix who was a drug addict and who had been declared mentally incompetent. The will had been made five and one-half months before her death and was neither explained nor read to her, and her physician, who examined her two days before execution of the will, testified that she was not competent.⁹² The Fourth District felt the trial court had enough evidence to reasonably conclude that the testatrix

87. *In re Estate of Rapé*, 243 So.2d 599 (Fla. 4th Dist. 1971).

88. 238 So.2d 161 (Fla. 3d Dist. 1970).

89. *Id.* at 162.

90. 247 So.2d 488 (Fla. 2d Dist. 1971).

91. *Id.* at 491.

92. *In re Estate of Whitehead*, 248 So.2d 186 (Fla. 4th Dist. 1971).

had testamentary capacity and that the will was not a product of undue influence, but rather motivated by acts of kindness on the part of the major beneficiaries.

Finally, in *Moses v. Rainey*,⁹³ the District Court of Appeal, Second District, upheld a will where the testatrix left the bulk of her estate to strangers because she thought that her sister had taken control of her pension fund. The sister unsuccessfully alleged that the testatrix was under an insane delusion, mentally incompetent, and that no such pension fund ever existed. However, Acting Chief Judge Pierce, in explaining his decision to uphold the will, clearly reaffirmed the great discretion which is left to the trier of fact when he stated:

The case poses to this court a most delicate, as well as a most closely balanced, issue as to the testatrix's testamentary capacity, one which we would probably feel impelled to affirm, whichever way the trial Judge had ruled. Maybe if we had been the triers of fact we would have held to the contrary. But we cannot say, as a matter of law, that on this record the eminent trial Judge was clearly in error in his finding.⁹⁴

3. UNDUE INFLUENCE

a. Attorney as Beneficiary

The District Court of Appeal, First District, held in *In re Estate of Nelson*⁹⁵ that the defendant attorneys, named as trustees, were beneficiaries of the estate even though *not* named in the will as legatees or devisees. However, there was sufficient evidence to rebut the presumption of undue influence which normally arises when one is in a confidential relationship with the decedent. Here, the decedent had bequeathed a major portion of his estate to a trust with the defendant attorneys who drew up the documents as trustees with unlimited discretion to distribute the income or corpus for religious, educational, scientific, charitable, or literary purposes as they should see fit. The defendant attorneys were also named executors and had sole authority to fix fees for themselves and their law firm, subject to court approval. While the First District did not find undue influence in this case, Judge Wigginton did state that the provision of the will conferred real and substantial tangible or intangible benefits over and above compensation and that the trial court's finding was "clothed with a presumption of correctness."⁹⁶

In *In re Estate of Rapé*,⁹⁷ the principle beneficiary was the testa-

93. 241 So.2d 442 (Fla. 2d Dist. 1970).

94. *Id.* at 444.

95. 232 So.2d 222 (Fla. 1st Dist. 1970).

96. *Id.* at 224. This case should serve as a warning to attorneys named as trustees who think they may never be considered beneficiaries and accused of undue influence.

97. 243 So.2d 599 (Fla. 4th Dist. 1971).

trix's attorney who was having an illicit love affair with her. The District Court of Appeal, Fourth District, held that while this circumstance gave rise to a presumption of undue influence, the presumption was not evidence and had only procedural consequences. Here the presumption was effectively rebutted, and the will was upheld.⁹⁸

b. Others as Beneficiary

In *In re Estate of Dalton*,⁹⁹ relatives of the testatrix raised the issue of undue influence by a third party upon the testatrix. The District Court of Appeal, Third District, held as a matter of law that it would not disturb the county judge's findings that there had been no presumption of undue influence raised. The court added that even if a presumption of undue influence should have been raised, that it would easily have been overcome by the clear and convincing evidence which appeared on the record from the lower court.

Perhaps the most significant case decided in the last two years in Florida dealing with undue influence and the role presumptions play is *In re Estate of Carpenter*.¹⁰⁰ Here, the daughter, the will proponent, had her mother, the testatrix, hospitalized. The daughter then called her own attorney to the hospital to draw her mother's will naming the daughter as sole beneficiary to the exclusion of her three brothers. The attorney questioned the testatrix in private to determine her true intent. He then arranged for two witnesses (one a doctor) and executed the will in the hospital. Later, the will was explained again to the testatrix. The probate court held that the will was void due to the presumption of undue influence arising from the sole beneficiary actively procuring the will via a confidential relationship. The District Court of Appeal, Fourth District, reversed the finding of the probate court, holding that the testimony of the attorney, who drafted the will and witnessed its execution, that it was in accord with wishes of the testatrix who had acted freely and voluntarily was sufficient to erase the presumption of undue influence by the sole beneficiary.

Judge Owen, speaking for the Fourth District in *Carpenter*, discussed at length the concept of undue influence and the role of presumptions. Regarding undue influence, he stated that it is "conduct which must amount to overpersuasion, duress, force, coercion, or artful or

98. The court cited *In re Estate of Carpenter*, 239 So.2d 506 (Fla. 4th Dist. 1970), discussed fully in the next section of this survey. See notes 100-04 *infra* and the related textual discussion.

99. 246 So.2d 612 (Fla. 3d Dist. 1971).

100. 239 So.2d 506 (Fla. 4th Dist. 1970). Subsequent to the period embraced by this survey, the Supreme Court of Florida decided this case on conflict certiorari. *In re Carpenter*, 253 So.2d 697 (Fla. 1971). This case substantially affirmed the major holding of the District Court of Appeal, Fourth District, but modified that opinion in other respects. The case is probably one of the most significant cases handed down in recent years dealing with the shifting presumptions of proof in will contests when undue influence is raised. See Note, 26 U. MIAMI L. REV. 283 (1971) *infra*.

fraudulent contrivances to such a degree that there is destruction of the free agency and will power of the one making the will."¹⁰¹ In dealing with undue influence direct proof is not always available, leaving one to reply upon circumstantial evidence or a presumption.¹⁰² Regarding the proper function of the presumption in this area, Judge Owen stated what has now become a frequently repeated quotation:

It is a rule of law which attaches to certain evidentiary facts and is productive of certain procedural consequences. . . . The procedural consequence of the presumption is simply that in the absence of credible evidence contradicting the presumed fact, the court determines as a matter of law that the presumed fact is true.

It should be emphasized, however, that a presumption is not itself evidence and has no probative value.¹⁰³

Judge Reed dissented in *Carpenter* on the ground that the appellate court had improperly acted as a trial court.¹⁰⁴

4. CONTRACTS TO MAKE A WILL

In *Talmudical Academy v. Harris*,¹⁰⁵ the District Court of Appeal, Third District, did not uphold a contract made in Maryland for a charitable bequest by a decedent who died in Florida since the contract did not conform to section 731.051 of the Florida Statutes (1969).¹⁰⁶

5. REVOCATION

In *In re Estate of Bancker*,¹⁰⁷ the District Court of Appeal, Fourth District, held invalid the attempted revocation of a will which was torn into pieces and flushed down a toilet at the testator's request. While the instrument was indisputably destroyed, it was not destroyed in the presence of the testator, and the revocation was thus ineffective pursuant to the requisites set down in Florida Statutes section 731.14(1) (1969).¹⁰⁸ "[S]trict compliance with the statutory requirements is a prerequisite for the valid creation or revocation of a will."¹⁰⁹ In addi-

101. *Id.* at 508.

102. *Id.* at 509.

103. *Id.*

104. In reaching this conclusion the majority has, in my opinion, substituted its judgment for that of the trial judge with respect to the credibility of witnesses and the weight to be accorded their testimony. This is not a proper function of the appellate court.

Id. at 510 (dissenting opinion).

105. 238 So.2d 161 (Fla. 3d Dist. 1970).

106. See notes 88 and 89 *supra* and the related textual discussion therein for a detailed analysis of this case.

107. 232 So.2d 431 (Fla. 4th Dist. 1970).

108. "A will may be revoked by the testator himself or by some other person in his presence and by his direction . . ." FLA. STAT. § 731.14(1) (1969).

109. *In re Estate of Bancker*, 232 So.2d 431, 433 (Fla. 4th Dist. 1970).

tion, the court allowed the wife to reestablish the destroyed will by the testimony of disinterested witnesses as provided by section 732.27(3) of the Florida Statutes (1967).

B. *Interests Arising out of the Marital Tie*

1. DOWER

In a case of first impression,¹¹⁰ the District Court of Appeal, Second District, denied a widow dower rights to real property located in Michigan which was conveyed while she was still married but without her relinquishment of dower rights on the theory that dower is a creature of statute¹¹¹ and determined by the law of the situs of the property and not the law of the domicile of the parties. Thus, Michigan statutes which give no dower right to a non-resident wife of lands conveyed by her husband during coverture were held to control.¹¹²

In *Libberton v. Libberton*,¹¹³ a wife wished to prevent her husband from dissipating all the personalty he received as a result of a separation agreement. Therefore, she sought immediately the present value of her inchoate dower rights. The court denied the wife's attempt since her dower rights to personalty under section 731.34 of the Florida Statutes (1969) attached only to personal property which the husband possessed at the time of his death. "A wife's inchoate right of dower in her husband's personalty is on the same footing with the expectancy of an heir before his decedent's death."¹¹⁴

In *In re Estate of Herron*,¹¹⁵ the District Court of Appeal, Fourth District, held that the proceeds of a life insurance policy in an inter vivos trust with a pour-over will were not subject to dower.¹¹⁶

2. HOMESTEAD

The rule that "homestead property can be alienated by a bona fide transaction based upon valuable consideration" was applied in *Morgan v. Riley*.¹¹⁷ In *Morgan*, the conveyance of homestead property by a husband to his wife was upheld since the wife was able to show her independent contribution toward the purchase price.

Property which is not homestead is capable of being devised by will. The District Court of Appeal, Second District, in *In re Estate of Wilder*,¹¹⁸ allowed a grandmother to devise certain real property even though her grandson alleged that she was the head of the household,

110. *In re Estate of Johnson*, 240 So.2d 840 (Fla. 2d Dist. 1970).

111. FLA. STAT. § 731.34 (1969).

112. *In re Estate of Johnson*, 240 So.2d 840, 843 (Fla. 2d Dist. 1970).

113. 240 So.2d 336 (Fla. 4th Dist. 1970).

114. *Id.* at 339.

115. 237 So.2d 563 (Fla. 4th Dist. 1970).

116. See note 46 *supra* and the related textual discussion of this case in detail.

117. 239 So.2d 524, 527 (Fla. 1st Dist. 1970) [hereinafter cited as *Morgan*].

118. 240 So.2d 514 (Fla. 1st Dist. 1970).

thus making the property homestead and incapable of being devised. The court rejected the grandson's contention and held that the grandmother was not the head of a household pursuant to section 731.05(1) of the Florida Statutes (1969) for purposes of homestead exemption.¹¹⁹ Since the grandson and his wife were both gainfully employed and since the grandson considered himself the head of his own family, the court held that no legal duty of support attached to the grandmother and that consequently the property should not be characterized as homestead.

A husband divorced his first wife, remarried, and conveyed homestead property to himself and his second wife as a tenancy by the entirety under section 4(c) of article X of the 1968 Florida Constitution. Prior to the conveyance, the first wife had obtained a judgment for unpaid alimony. Subsequent to the conveyance, the husband died. The District Court of Appeal, Third District, in *Bendl v. Bendl*¹²⁰ held that the first wife had an undivided one-half interest along with the second wife's undivided one-half interest in the homestead. However, it was held that the first wife could not impress a lien on the second wife's interest because the second wife took by right of survivorship under a tenancy by the entirety, and therefore, her interest could not be used to satisfy the debts of her deceased husband. It is important to note, however, that this immunity did *not* come from the homestead exemption.

In a per curiam opinion, the District Court of Appeal, Third District, in *Benvenuti v. Benvenuti*,¹²¹ upheld the trial court's finding of the location of decedent's constitutional homestead at the time of death.

3. JOINT TENANCY

Where land was deeded specifically to the mother and daughter as joint tenants with right of survivorship pursuant to section 689.15 of the Florida Statutes (1969), and the mother later remarried and then died intestate, the daughter was granted entire title as against the mother's second husband in the case of *La Pierre v. Kalergis*.¹²²

C. Construction and Testamentary Intent

In *re Estate of Wood*,¹²³ a case of first impression in Florida, involved a latent ambiguity between the actual wording of certain paragraphs and the general intent of the will as a whole. In *Wood*, a husband and wife executed similar wills with the same common disaster paragraph which left their estates to each other's named relatives on a 50-50

119. FLA. STAT. § 731.05(1) (1969) provides:

[W]henever a person who is head of a family, residing in this state and having a homestead therein, dies and leaves either a widow or lineal descendants or both surviving him, the homestead shall not be the subject of devise, but shall descend as otherwise provided in this law for the descent of homesteads.

120. 246 So.2d 574 (Fla. 3d Dist. 1971).

121. 227 So.2d 895 (Fla. 3d Dist. 1969).

122. 251 So.2d 885 (Fla. 1st Dist. 1971).

123. 226 So.2d 46 (Fla. 2d Dist. 1969) [hereinafter cited as *Wood*].

basis. The problem arose because the wife's will did not make any provision for her estate where the spouses did not die in a common disaster. In fact, there never was a common disaster, and the husband predeceased his wife. The District Court of Appeal, Second District, however, found that the devisees took under the common disaster clause because a latent ambiguity existed, and parol or extrinsic evidence was admissible to show the actual intent of the testator. This case demonstrates the rule that when the testator's actual intent becomes clear and convincing, "the courts may construe a will as if words were inserted therein when such words were omitted solely by inadvertence or oversight and are essential to the expression of the testator's manifest intention."¹²⁴ Chief Judge Hobson, in discussing will construction and testamentary intent, went on to state what has become perhaps the most quoted rule in this area of Florida law today:

The learned county judge entered his findings and opinion as follows, with which we agree and adopt as part of this opinion:

* * * *

This Court is inclined to follow the law as set down by the Honorable Judge Wigginton, In re Parker's Estate, 110 So.2d 498, and the numerous cases cited therein in which it was stated "It is uniformly held in this jurisdiction that in construing last Wills and Testaments *the polar star by which the Court is guided is the intent of the testator as ascertained by a consideration of the entire instrument*, and not some isolated segment thereof."¹²⁵

Where the testatrix who had no grandchildren used the word "grandchildren" in a will, the District Court of Appeal, First District, held that this language constituted a latent ambiguity. Thus, extrinsic evidence was admissible to show that the persons to whom the testatrix made reference were the children of the son of her first husband by a former marriage.¹²⁶

A residuary clause provided for four named children of a testator's nephew who were living at the time the will was executed. After the execution of the will, a fifth child was born. The District Court of Appeal, Fourth District, in *In re Trust of Hennes*¹²⁷ held the disposition to be to a class rather than to the four named children. Therefore, the court allowed the fifth child to share equally in the proceeds. "Thus, we somewhat baldly, having only the words of the will before us, reach out for the testator's intention, such being the pole star of will construction efforts."¹²⁸

^{124.} *Id.* at 50.

^{125.} *Id.* at 47-48 (emphasis added).

^{126.} *Scheurer v. Tomberling*, 240 So.2d 172 (Fla. 1st Dist. 1970).

^{127.} 240 So.2d 859 (Fla. 4th Dist. 1970).

^{128.} *Id.* at 860 (footnote omitted). See note 125 *supra* and the related quoted material in the text.

An example of how far courts will go to uphold what is believed to be the testator's intent is illustrated in *Auten v. Conway*.¹²⁹ In that case, the District Court of Appeal, Third District, allowed a handwritten memorandum using precatory words to be admitted to probate over the testatrix's prior formal will.

In *Jenkins v. Donahoo*,¹³⁰ the Supreme Court of Florida settled the question of the effect of later statutory changes on previously executed wills. The case involved the Uniform Principal and Income Law of Florida¹³¹ and a testamentary mutual investment trust directing the "determination of income and principal . . . in accordance with the income and principal statutes of the State of Florida."¹³² Eight months after the testatrix died, the act was amended, making the distribution of capital deemed principal and not income, irrespective of the choice of the trustee.¹³³ The trustees brought a declaratory judgment action since the law in effect at the time of the will's execution required the allocation of dividends to income. The Supreme Court of Florida held that absent language to the contrary, the "presumption is that the testatrix intended reference to those statutes as they existed at the time the will was executed,"¹³⁴ again stating the polar star is the intent of the testator.¹³⁵ Regarding the effect of statutory changes, Justice Boyd further stated:

The right of trust beneficiaries to benefits in accord with the testator's lawful direction is basic. Only changes in the statutory laws not affecting substantial rights and not contrary to the expressed intent of the testator may be applied retroactively.¹³⁶

When a will is subject to two interpretations, one which makes it an illegal perpetuity and the other which makes it valid and operative, the courts will adopt the latter.¹³⁷

In *Guilliams v. The First National Bank*,¹³⁸ the language in the will evidenced an intent to impose a condition precedent, rather than a condition subsequent, to the vesting of title in the remaindermen beneficiaries. The District Court of Appeal, Second District, held that title did

129. 240 So.2d 502 (Fla. 3d Dist. 1970).

130. 231 So.2d 809 (Fla. 1970).

131. FLA. STAT. ch. 690 (1969).

132. *Jenkins v. Donahoo*, 231 So.2d 809, 810 (Fla. 1970).

133. "[P]rovided however, that all distributions of capital of mutual investment trusts shall be deemed principal irrespective of the choice made by the trustee." FLA. STAT. § 690.06(1) (1969).

134. *Jenkins v. Donahoo*, 231 So.2d 809, 811 (Fla. 1970).

135. *Id.* See note 125 *supra* and the related quoted material in the text.

136. *Jenkins v. Donahoo*, 231 So.2d 809, 812 (Fla. 1970).

137. *In re Estate of Stewart*, 242 So.2d 781 (Fla. 4th Dist. 1970). But see notes 79-81 *supra* and the related textual discussion, where the court declined to apply the cy pres doctrine.

138. 229 So.2d 633 (Fla. 2d Dist. 1969).

not vest in the remainderman who failed to fulfill the condition precedent; namely, the payment of taxes, utilities, repairs, and insurance on the estate while the holder of the life estate was alive. The mere inability of the potential devisees to perform a condition precedent did not relieve them of the duty to perform.¹³⁹

A provision in a will devised certain property to the testator's adult son, and a residuary clause provided that in the event of the son's death, the trustee was to distribute the income from the estate not otherwise disposed of by prior provisions of the will to the son's wife and two children. By examining the entire will and omissions in other clauses, it was found that the residuary clause related only to the portion the son would have been entitled to had he lived.¹⁴⁰

"[T]he Florida Probate Law uses the term 'survivor' to mean the survivor or last living of a designated group rather than the heirs at law of a deceased member of that group."¹⁴¹ Thus, Florida gives this term its literal and common meaning.

In *In re Estate of Freedman*,¹⁴² a child of the testator was specifically mentioned in previous wills which stated that there would be no provision for her. The District Court of Appeal, Third District, held that the petitioner was not a pretermitted child under section 731.11 of the Florida Statutes (1969). The petitioner had changed her name, and there had been later codicils republished after the name change. In addition, the court held that under section 731.17 of the Florida Statutes (1969), a codicil sufficiently republishes the will if its only reference is to the will itself without reference to the date of the prior will.¹⁴³

D. Jurisdiction

In *First National Bank v. Moon*,¹⁴⁴ the District Court of Appeal, Fourth District, clarified the \$100 jurisdictional limit for county judge's courts under section 36.01(1) of the Florida Statutes (1969). After property is transferred to the beneficiary and he brings a devastavit action¹⁴⁵ claiming in excess of \$100, the circuit court or court of record has proper jurisdiction even if some other portion of the estate is still pending administration. However, it is important to note that the beneficiary must be bringing the action for his own individual recovery for section 36.01 (1) to apply. If he brings the devastavit action for the estate, then jurisdiction remains in the county judge's court pursuant to its exclusive right to handle probate matters regardless of the amount involved.¹⁴⁶

An order from the county judge's court where the court reserves

139. *Id.* at 635.

140. *In re Trust of Carmichael*, 227 So.2d 237 (Fla. 1st Dist. 1969).

141. *In re Estate of Gallop*, 248 So.2d 686, 689 (Fla. 4th Dist. 1971).

142. 226 So.2d 423 (Fla. 3d Dist. 1969).

143. *Id.* at 427.

144. 234 So.2d 402 (Fla. 4th Dist. 1970).

145. FLA. STAT. § 733.53 (1969).

146. *First Nat'l Bank v. Moon*, 234 So.2d 402, 405 (Fla. 4th Dist. 1970).

jurisdiction is interlocutory in character and not appealable to the district court of appeal until the order becomes final.¹⁴⁷ Alternatively, a probate judge does *not* have any jurisdiction to entertain a petition for rehearing *after* he has entered a final order.¹⁴⁸

The District Court of Appeal, First District, in *In re Estate of Raymond*,¹⁴⁹ held that the county judge's court has jurisdiction to determine the status of property in question when the heirs allege it is homestead and exempt against the claims of a creditor. "[T]he county judge *does have jurisdiction to make a finding, for administrative purposes, of what assets belong to the estate.*"¹⁵⁰

When petitioners, after three years of litigation in the county judge's court, first raised the question of domicile, they were held to have waived the right to challenge the fact of domicile on equitable grounds as distinguished from the general power of the court to adjudicate the class of cases to which the subject matter of the pending case belonged.¹⁵¹

E. Probate and Administration

1. LIMITATIONS ON CLAIMS AND THEIR PAYMENT

Numerous cases arose under section 733.16 of the Florida Statutes (1969),¹⁵² the so-called non-claim statute, and under section 733.18 of the Florida Statutes (1969) regarding payment of claims and objections thereto.

"The power of a personal representative derives from a legislative grant. It should be exercised strictly in accord with the prescriptions laid down by the granting authority."¹⁵³ For this reason, the Supreme Court of Florida, in *Twomey v. Clausohm*,¹⁵⁴ reversed the District Court of Appeal, Second District,¹⁵⁵ and disallowed the payment of certain claims by the personal representative. The claims had not been filed in compliance with section 733.16 of the Florida Statutes (1969) which generally requires the filing of all claims against the estate within six months of the first publication of notice to creditors.

In *Goldberg v. Michalik*,¹⁵⁶ where the plaintiff was also the administratrix, the filing of her claim was held to be within the six month period prescribed by section 733.16 of the Florida Statutes (1969). The publication of first notice to creditors could not occur before letters of

147. *In re Estate of Herlan*, 239 So.2d 274 (Fla. 1st Dist. 1970). *But see* note 164 *infra* and the related textual quotation.

148. *In re Estate of Armistead*, 240 So.2d 830 (Fla. 1st Dist. 1970).

149. 246 So.2d 124 (Fla. 1st Dist. 1971).

150. *In re Estate of Herron*, 237 So.2d 563, 566 (Fla. 4th Dist. 1970) (emphasis supplied by court).

151. *In re Estate of Dalton*, 246 So.2d 612, 614 (Fla. 3d Dist. 1971).

152. Fla. Laws 1971, ch. 71-32, *adding* FLA. STAT. § 733.16(1)(e), exemption to this statute. *See* note 36 *supra* and the related textual discussion of this change.

153. *Twomey v. Clausohm*, 234 So.2d 338, 341 (Fla. 1970).

154. *Id.*

155. *Clausohm v. Twomey*, 226 So.2d 226 (Fla. 2d Dist. 1969).

156. 237 So.2d 298 (Fla. 2d Dist. 1970).

administration were issued under section 733.15 of the Florida Statutes (1969). In addition, there was no service of process problem since the plaintiff was serving herself.

In *Stanton v. Kruse*,¹⁵⁷ the plaintiff was aware of decedent's death and had actual notice of the publication of notice to creditors. At the request of the attorney representing the estate, the plaintiff did not file suit within the requisite six months. The District Court of Appeal, Third District, held that this was not sufficient cause to extend the six month time requirement of the non-claim statute.

The Supreme Court of Florida in *In re Estate of Sale*,¹⁵⁸ held that section 733.18 of the Florida Statutes (1969) regarding payment of and objections to claims merely operates as a rule of judicial procedure and *not* as a non-claim statute. Thus, the two month time requirement for filing objections can be relaxed in the sound discretion of the trial judge for "good cause" shown.¹⁵⁹ But the District Court of Appeal, First District, denied an extension to the two month requirement of section 733.18 (2) where the claimant had knowledge of the timely objection to his claim, but refused to answer the objection because he believed his claim to be just.¹⁶⁰ The court indicated that good cause had not been shown since nothing the administrator did could have lulled the claimant into a false sense of security regarding his claim.

2. FLORIDA RULES OF PROBATE AND GUARDIANSHIP PROCEDURE

The District Court of Appeal, Fourth District, upheld the withholding of sufficient funds to pay for expenses arising from a re-accounting which it had previously ordered.¹⁶¹ As a result of that withholding, the amount ultimately paid out was less than the amount ordered to be paid out as a result of the re-accounting. The court relied upon rule 5.430(d) of the Probate and Guardianship Rules for its rationale.¹⁶²

The District Court of Appeal, Third District, in *In re Estate of*

157. 229 So.2d 657 (Fla. 3d Dist. 1970). See also *Grayson v. Maeder*, 247 So.2d 774 (Fla. 3d Dist. 1971) [this case previously before the Florida courts in *Grayson v. Maeder*, 227 So.2d 308 (Fla. 3d Dist. 1969)]; *Domnick v. Ware*, 240 So.2d 654 (Fla. 3d Dist. 1970); *Maeder v. Grayson*, 222 So. 2d 242 (Fla. 3d Dist. 1968); *Grayson v. Maeder*, 186 So.2d 796 (Fla. 3d Dist. 1966).

158. 227 So.2d 199 (Fla. 1969).

159. The creditor or claimant shall thereupon be limited to two calendar months from the date of such service within which to bring appropriate suit, action or proceedings upon such claim or demand. The county judge for good cause shown may extend the time for filing objection to any claim or demand or the time for serving such objection, and may likewise for good cause shown extend the time for filing appropriate suit, action, or proceedings upon any such claim after objection is filed

FLA. STAT. § 733.18(2) (1969).

160. *First Bank and Trust Co. v. Bush*, 226 So.2d 438 (Fla. 1st Dist. 1969).

161. *Methodist Episcopal Church v. Richardson*, 244 So. 475 (Fla. 4th Dist. 1970).

162. The personal representative may, before making distribution, retain from the funds in his hands a sufficient amount to pay the expenses accrued since the filing of his final report and his application for discharge.

FLA. R. PROB. & GUARD. 5.430(d).

Falk,¹⁶³ required the answers to fourteen certified questions posed by the caveators. The court held that the answers sought were relevant to the claims and could be provided with little or no additional expense to either party. The rationale was found in rules 5.080 and 5.150 of the Probate and Guardianship Rules.

"An order fixing attorney's fees in a probate proceeding is 'final' in the sense that it is an appealable order although it may not be the last such order in an estate."¹⁶⁴

3. EXECUTORS AND ADMINISTRATORS

The District Court of Appeal, First District, in *In re Estate of Raymond*,¹⁶⁵ held that the fact that a creditor's claim is unliquidated and arises out of an automobile accident is *not* a reason to deny the appointment of an administrator for the estate as failure to do so would keep the claim from ever becoming liquid.

In *In re Estate of Maxcy*,¹⁶⁶ the District Court of Appeal, Second District, held that two or more attorneys for co-executors may not receive in the aggregate more in fees than one attorney would have received for performing the required legal services for the estate. In so holding, the court stated that a number of attorneys representing one or multiple co-executors and being paid out of estate funds is generally not permissible.¹⁶⁷

A decedent died intestate, the appointed administrator contacted the only living relative he could find, checked a safe deposit box and found no will, and made distribution two years after death. The administrator was not held personally liable when sons of the decedent came forward four years after his death although they knew of the decedent's death some time prior to coming forward. The District Court of Appeal, Second District, in so holding, announced the standard of care required of an administrator:

[T]he County Judge entered order . . . finding that "the administrator . . . exercised the diligence that an ordinary prudent man would exercise under like circumstances. Although hindsight would tend to show that the administrator acted incautiously, if his acts, as proven, are examined in sequence, it appears that he performed naturally and sufficiently prudently as to not constitute negligence."¹⁶⁸

In *Stephan v. Brown*,¹⁶⁹ the District Court of Appeal, Second District, held that after one buys real estate from an executrix and accepts

163. 247 So.2d 485 (Fla. 3d Dist. 1971).

164. *In re Estate of Cook*, 245 So.2d 694, 695 (Fla. 2d Dist. 1971), *citing* FLA. R. PROB. & GUARD. Rule 5.100.

165. 237 So.2d 84, 86 (Fla. 1st Dist. 1970).

166. 240 So.2d 93 (Fla. 2d Dist. 1970).

167. *Id.* at 95.

168. *In re Estate of Pennington*, 226 So.2d 881, 883 (Fla. 1st Dist. 1969).

169. 233 So.2d 140 (Fla. 2d Dist. 1970).

the executrix's deed, there is a merger of the contract for sale and the executrix's deed, and the latter controls on warranties. The rationale is that the executrix can only convey what the decedent had. Thus, even though the contract provided for sale free and clear of encumbrances, there were in fact encumbrances, and the executrix's deed contained no warranty against them.

Under section 732.44(3) of the Florida Statutes (1969), brothers and half-sisters are of the same degree. Therefore, letters of administration shall be granted to the one selected in writing by the majority of them even if the brother is not notified.¹⁷⁰

4. ADMINISTRATION GENERALLY

The District Court of Appeal, Fourth District, in *In re Estate of Jackson*,¹⁷¹ refused to allow the revocation of the probate court's order of final discharge even where the testator's minor son, who had neither actual nor constructive notice of probate, filed for revocation one day after the order of final discharge was entered. The court strictly construed section 732.30(1) of the Florida Statutes (1969), which permits an heir not served with notice of probate nor barred under section 732.29 of the Florida Statutes (1969), "to petition for revocation of probate *at anytime before final discharge of the personal representative*."¹⁷² This language was held to prohibit filing *after* discharge.

In *The First National Bank v. Cooper*,¹⁷³ the District Court of Appeal, Second District, held that the administrator's motion for leave to file a third-party complaint against the widow should have been granted to decide a creditor's lien on an estate since the administrator had to pay the decedent's debt. Since in this instance the widow's possible liability for the debt was in question, the court found the administrator's motion to be proper.

Procedurally, failure to attach copies of the wills, codicils, and trust agreements to the record on appeal when suing executors and trustees to determine their duties will guarantee a lost case for the plaintiffs on the grounds of failure to establish an adequate record on appeal.¹⁷⁴

Where the executrix did not raise the affirmative defense of payment of a note from decedent to plaintiff four days prior to decedent's death, there would be no presumption of payment by the decedent.¹⁷⁵

Failure to allege ultimate facts to establish a fiduciary relationship between the parties, coupled with a vague and indefinite complaint re-

170. *In re Estate of Carty*, 227 So.2d 894 (Fla. 2d Dist. 1969).

171. 236 So.2d 475 (Fla. 4th Dist. 1970).

172. *Id.* at 476 (emphasis supplied by court).

173. 234 So.2d 698 (Fla. 2d Dist. 1970).

174. *Jones v. The First Nat'l Bank*, 226 So.2d 834 (Fla. 4th Dist. 1969).

175. *Pollack v. Meyer*, 242 So.2d 796 (Fla. 3d Dist. 1971); *accord*, *Windle v. Sebold*, 241 So.2d 165 (Fla. 4th Dist. 1970) (held error to strike affirmative defense of satisfaction of mortgage alleged by personal representative).

garding the amount of assets, the time they were received, or the circumstances surrounding their receipt, resulted in a dismissal with prejudice of an alleged action for mismanagement of an estate in *Maiden v. Carter*.¹⁷⁶

In *Bodne v. Ferrell*,¹⁷⁷ the District Court of Appeal, Third District, upheld a substantial award of attorney's fees against an estate. The granting of such fees was found to be within the trial judge's discretion and to be supported by expert testimony.

F. *Inter Vivos Gift*

In *Wood v. McClellan*,¹⁷⁸ a daughter and her father had intended to set up a joint savings account by transferring funds from the father's account into the joint account. All of the signature cards were filled out for the joint account, but the daughter ordered the bank not to make the transfer until a certain date in order to earn a higher interest payment. Six days prior to the appointed date the father died. The District Court of Appeal, First District, held that there had been *no* inter vivos gift of the funds to the daughter and that the funds from the father's account properly belonged to his estate. The rationale given by the court was that there was no intent to deliver the funds until the interest was earned and paid and that there was no acceptance of the funds until after the decedent's death. Judge Rawls went on to explain:

When a claim of a gift is not asserted until after the death of the alleged donor, the donee must show by clear and satisfactory evidence every element which is requisite to constitute a gift. [Citations omitted] . . . The elements include donative intent, delivery—either actual, constructive or symbolic— an acceptance by the donee.¹⁷⁹

In *McDonough v. Rudisill*,¹⁸⁰ the District Court of Appeal, the Second District, upheld as a completed inter vivos gift the delivery of stock certificates by the decedent to his niece and nephew even though they delivered the certificates *back* to their uncle, and he sold them with their authority. He also made no accounting to them prior to his death, but this also was not held to invalidate the gift.

The registering of stock certificates in joint tenancy creates only a rebuttable presumption of an inter vivos gift. In *Sullivan v. American Telephone & Telegraph Co., Inc.*,¹⁸¹ the decedent purchased stock and registered it in joint tenancy with her son, but maintained possession, received all dividends for her personal expenses, and her son never saw

176. 234 So.2d 168 (Fla. 1st Dist. 1970).

177. 233 So.2d 862 (Fla. 3d Dist. 1970).

178. 247 So.2d 77 (Fla. 1st Dist. 1971).

179. *Id.* at 78.

180. 229 So.2d 268 (Fla. 2d Dist. 1969).

181. 230 So.2d 18 (Fla. 4th Dist. 1970).

the certificates. The District Court of Appeal, Fourth District, held that there was a lack of present donative intent, thus invalidating the gift, and that the stock belonged to the estate.

G. *The Rule Against Perpetuities*¹⁸²

The District Court of Appeal, Fourth District, held that a special power of appointment given to an attorney to make distribution of a testamentary trust upon the death of a life tenant was not violative of the Rule Against Perpetuities.¹⁸³ Even if the named attorney died before the life tenant, without exercising the power of appointment, the trust residue would have passed by intestacy at the death of the life tenant. The court indicated that the words, "if at all,"¹⁸⁴ in the Rule Against Perpetuities were the lifegiving words of the rule since, in the instant case, there would be vesting by intestacy.¹⁸⁵

V. ADDENDUM—EFFECT OF NEW FLORIDA RULES OF CIVIL PROCEDURE

The present Florida Rules of Civil Procedure were amended by the Supreme Court of Florida and took effect after 12:01 a.m. December 13, 1971.¹⁸⁶

Newly added Rule 1.110(h), which covers subsequent pleadings under the general rules of pleading, was added to cover a subject usually arising under trust supervision. "It is intended to establish the same method of pleading for subsequent proceedings as is applicable to the original proceeding."¹⁸⁷

New Rule 1.627, which covers trust accounting, "incorporates the provisions of Section 737.03, 737.04 and 737.09 through 737.16 Florida Statutes and adds additional provisions about the method of examining or auditing accounts."¹⁸⁸ The remaining provisions of chapter 737 of the Florida Statutes (1969) are unaffected since they are considered substantive in nature. This rule is extensive in nature and scope and too long to be covered in this survey.

Additionally, form 1.950 entitled "Trust Qualification Petition" was added.¹⁸⁹

182. The best statement of this rule is that which tracks the language of John Chipman Gray and is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." A. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 127 (2d ed. 1966).

183. *In re Estate of Stewart*, 242 So.2d 781 (Fla. 4th Dist. 1970).

184. *Id.* at 784. See note 182 *supra*.

185. *Id.*

186. *In re Florida Rules of Civil Procedure*, 253 So.2d 404 (Fla. 1971). Even though these amendments to the rules were promulgated after the period covered by this survey, they will be discussed in a limited manner because they add two new rules and one new form affecting trusts.

187. *Id.* at 406 (Committee Note, 1971 Amendment to FLA. R. CIV. P. 1.110(h)).

188. *Id.* at 413 (Committee Note, adopted 1971, to FLA. R. CIV. P. 1.627).

189. *Id.* at 413-14.